Commission's regulations should require that franchising authorities adhere to confidentiality requests as a condition for certification.

J. Most Rate Decisions Generally Should Be Appealed To The Commission.

The Commission seeks comment on the "appropriate forum for appeals of local authorities' rate decisions."[63/] Cox believes that the Commission is the proper forum for review of the procedural aspects of a franchising authority's rate decisions. These would include issues regarding the presence or absence of effective competition and proper certification of the franchising authority to regulate rates. Since it is the Commission which is establishing the benchmarks (or an alternative test) for rates, the Commission is also the proper forum to resolve disputes between the cable operator and the franchising authority concerning whether a particular rate is within the benchmark. Issues regarding whether a rate increase outside the benchmark is reasonable should also be resolved by the FCC.

K. Joint Certifications Can Conserve Resources.

The Commission proposes to permit and encourage joint certification of the communities that are served by one system. Joint certification would promote administrative efficiencies, and this would be consistent with the Commission's mandate to seek and to reduce administrative burdens on cable operators and franchising authorities, and to maintain reasonable rates. In the

63/ *Notice* at ¶ 87.

absence of joint certification procedures, in many cases operators would be required to seek approval for rate increases from multiple franchising authorities. In some cases operators might be required to put rate increases into effect in some communities and not others, or defer the increases pending resolution of the rate disputes with one or more franchising authorities. The administrative burdens and concomitant costs associated with this process are inconsistent with the 1992 Cable Act's goal of minimizing administrative burdens on all parties.[64/]

Joint certification would also enable many more communities to qualify for certification which otherwise would not meet statutory requirements because they do not have the personnel or the financial resources necessary to administer Federal regulations.[65/] Joint certification procedures will also conserve the financial resources of each franchising authority joining the certification group because regulatory costs will be shared among several communities.[66/]

L. Franchising Authority Compliance Powers Are Limited.

The Commission seeks comment on the manner in which franchising authorities will monitor a cable operator's compliance with the

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64/ Varying rates from multiple franchising authorities may also violate the uniform rate structure provisions of the Cable Act depending on how the Commission defines "geographic area." 47 U.S.C. § 543(d).

65/ A franchising authority must have the legal authority to adopt, and the personnel to administer the Commission's rate regulations. 47 U.S.C. § 543(a)(3)(B).

66/ Even though joint certification is desirable, the threshold issue of the existence of effective competition must be decided on the basis of the franchise area. 47 U.S.C. § 543(l)(1).

Commission's regulations. In particular, the Commission is concerned with: (1) whether a franchising authority could order refunds if an operator failed to comply with a rate decision; (2) whether remedies such as revocation of franchises and fines would be available under state or local law; and (3) whether the Commission could impose forfeitures upon cable operators for failing to comply with franchising authority decisions that are consistent with the Commission's rules.[67/]

Franchising authorities are authorized pursuant to Section 623(a) of the 1992 Cable Act to regulate basic service rates in a manner which is consistent with the 1992 Cable Act and Commission regulations.[68/] For example, a franchising authority could require an operator to modify its rates to conform to a Commission benchmark. The 1992 Cable Act, however, does not provide a franchising authority the with the power to order a refund. Fines or other forfeitures can be imposed by the franchising authority only if it has such powers pursuant to its franchise agreement with the cable operator or state or municipal law.

M. The Commission Can Impose Forfeitures If Necessary.

The Commission seeks comment on whether it may impose forfeitures upon a cable operator who fails to comply with franchising authority

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67/ *Notice* at ¶ 86.

68/ 47 U.S.C. § 543(a).

determinations.[69/] Section 503(b) of the Communications Act of 1934 permits forfeitures for failure to comply with any FCC rule or regulation, or any provision of the 1992 Cable Act.

N. Basic Service Regulation By The Commission Should Generally Follow The Procedures Prescribed For Franchising Authorities.

Where certification has been denied or revoked pursuant to Section 623(a)(6), rates should be regulated by the Commission generally in accordance with the procedures that have been prescribed for the regulation of basic service rates by franchising authorities, except that the Commission may have to adjust filing and notice deadlines where it exercises basic rate jurisdiction.

In keeping with the requirement of the statute that interested parties be provided with an opportunity for comment, regulations should provide that interested parties shall file comments on the rate increase within thirty (30) of notification of the intent to implement the rate increase, and that an operator should file a response within (15) days.

Where an operator implements a rate increase that falls within a benchmark established by the Commission, it should automatically become effective within thirty days after notification to the Commission and the franchising authority. Where a rate increase falls outside of a benchmark the rate should automatically take effect within sixty (60) days unless the Commission

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69/ *Notice* at ¶ 86.

finds that the rate is not reasonable. This period of time should provide the Commission with an opportunity to review the increase, and to make a determination whether it is reasonable after considering the justification that the operator files with the Commission in support of the increase.

As for existing rates, operators should not be required to file a rate schedule, nor should the Commission be required to review the rates of a system, unless a franchising authority, upon the denial of certification or revocation, requests that the cable system be required to file a rate schedule with the Commission. Existing rates that fall within applicable benchmarks should be presumed valid. As with the case of requests for rate increases, upon the filing of an opposition to an existing rate by an interested party alleging that existing rates are not reasonable, the Commission should consider the justification authority submitted by the cable operator, and shall make a determination whether the rate is reasonable within sixty (60) days. Interested parties should file within thirty (30) days of the submission of the cable operator's rate schedule with the Commission.

In any case in which there is an unresolved question of fact, the Commission should adopt the same hearing procedures to determine whether the proposed rates are reasonable as it uses to determine whether cable programming rates are unreasonable.

VII. PROCEDURES FOR PROGRAMMING SERVICE REGULATION.

A. Should Complaint Procedures Provide A Fair Hearing.

The Commission must adopt complaint procedures which afford an expeditious means to determine whether a rate is unreasonable and to dismiss frivolous complaints. As noted in Part III, the adoption of a benchmark approach to regulation of cable programming services will facilitate this task. Rates that fall within appropriate benchmarks can be easily identified and complaints alleging that those rates are unreasonable will be subject to dismissal.

The Commission notes that the concurrence of a franchising authority in the filing of a complaint would facilitate the complaint process and might also ensure that the Commission's resolution of a cable programming service dispute did not undermine the franchising authority's regulation of rates.

This requirement would not be inconsistent with Section 623(c)(1)(B) of the 1992 Cable Act, which requires the Commission to establish fair and expeditious procedures for the receipt of complaints by any subscriber. Although Congress intended that subscribers have the right to file such complaints, the Commission must also establish procedures for the consideration and resolution of complaints that are fair and expeditious to the operator and the Commission, as well as the complainant. The Commission has the ability to temper a subscriber's rights to file a complaint so that the Commission can carry out its responsibilities under the 1992 Cable Act in a reasonable manner. The Commission must adopt procedures to assure that

administrative efficiency and dependability are preserved, and at the same time, provide complainants with a forum which is consistent with the requirements of the 1992 Cable Act.

Upon the filing of a complaint with the franchising authority that alleges that the rates for programming services are unreasonable, the franchising authority shall determine within twenty (20) days if the rates are within the benchmark (assuming the Commission chooses to use benchmarks). If the franchising authority determines that the rates are within the benchmark, the complaint shall be dismissed. If the rates are found to be outside the benchmark, the complainant may pursue its complaint with the Commission.[70/]

A subscriber that must first file its complaint with a franchising authority will be able to obtain the assistance of a franchise authority in a later filing at the FCC. A franchising authority's assistance could ensure that a complaint was complete, and it would provide the subscriber with information and guidance regarding the Commission's complaint procedures and the substantive showing that is necessary to demonstrate that rates are unreasonable. This will enhance the probability that the complaint will contain the necessary information for Commission review. An informed subscriber is less likely to file a complaint which needlessly burdens both the Commission and cable operators.

70/ In order to ease the administrative burden, the Commission should require that all complaints concerning a particular rate for programming services be consolidated.

Any complaint to the Commission should contain a certification that copies were served on both the franchising authority and the cable operator.[71/] An operator should not automatically be required to respond to all complaints filed with the Commission. The Commission staff would conduct a preliminary review to determine whether the complaint meets a minimum showing including a "de novo" review of whether the rates fall within a benchmark. Defective complaints that allege that rates are unreasonable should be dismissed.[72/] If the staff is unable to determine whether a rate falls within an appropriate benchmark, the staff should seek information from the operator as necessary to make that determination. If the staff then determines that the rates are within the benchmark, no further response by the operator would be required and the complaint would be dismissed.

Upon a determination by the staff that the rates for programming services do not fall within a relevant benchmark, an operator would be given the opportunity to demonstrate that the rates are nonetheless not unreasonable. An operator should be able to submit any information which it believes is relevant to this determination.

71/ Cox suggests that 10 days from the date of the franchising authority's decision would be an appropriate time period within which to file a complaint with the Commission that the rates are unreasonable.

72/ At a minimum, a complaint should include all relevant information about the complainant, the name of the operator charged, and a statement of the facts showing that rates are unreasonable. *See, e.g.,* 47 C.F.R. § 1.716 (detailing the requirements for informal complaints against common carriers).

The Commission should adopt procedures for hearings on cable programming service complaints that are consistent with the Commission's policies on hearings in other rate-related proceedings. Where it is alleged that a carrier's rates are unreasonable, the Commission does not have the discretion to resolve a complaint proceeding without a full hearing unless it determines that a hearing is not needed to resolve disputed questions of fact.[73/] The two-part procedure for determining whether hearings are necessary requires the Commission to ensure that the public interest, convenience, and necessity would be served by granting a hearing,[74/] and to grant a hearing unless no material facts are disputed.[75/]

This two-part standard has been applied by the Commission in deciding whether hearings were appropriate in telephone license disputes,[76/]

73/ *Connecticut Office of Consumer Counsel v. AT&T Communications,* 4 FCC Rcd 8130, 8133 (1989). *See also Comark Cable Fund III v. Northwestern Indiana Telephone Co.,* 104 F.C.C.2d 451, 460 (1985) (stating that "it is black letter law that when the decisionally-significant facts in a complaint proceeding pursuant to Section 208 of the [Communications] Act . . . are undisputed, . . . we have ample discretion . . . to resolve the matter upon the basis of evidence of record without need of resorting to time-consuming and costly full evidentiary proceedings").

74/ 47 U.S.C. § 309(a).

75/ 47 U.S.C. § 309(d)(2).

76/ *West Michigan Telecasters v. FCC,* 396 F.2d 688, 690 (D.C. Cir. 1968) (explaining that "Section 309(d) of the Act provides that, when the Commission finds there are no substantial and material questions of fact and a grant of the application would be consistent with the public interest, it shall make the grant requested").

petitions for review of denials of cellular applications,[77] and petitions for license transfers.[78] Adoption of similar procedures to determine whether rates for programming services are unreasonable would comply with the 1992 Cable Act and would provide a consistent forum for the resolutions of these disputes.

The Commission should adopt relaxed *ex parte* regulations until the Commission determines that a material fact is in dispute and formal hearing procedures are therefore necessary.[79] The most efficient procedure would be to have cable operators, at the outset, file information on the franchise area they serve, their rate structure, compliance with the benchmark standard, and any other information that would be relevant if a complaint were filed.[80]

When there is any risk that proprietary information may be revealed, the Commission should implement procedures to protect this information, and allow the operator an opportunity to defend its position that the information is proprietary. Such restrictions are currently applied to protect

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77/ *Gencom, Inc. v. FCC,* 832 F.2d 171,181 (D.C. Cir. 1987) (holding that "[u]nder Section 309(d)(2) the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented"). *Citing Citizens for Jazz on WRVR v. FCC,* 775 F.2d 392,394 (D.C. Cir. 1985).

78/ *Astroline Communications Co., Ltd. v. FCC,* 857 F.2d 1556,1561 (D.C. Cir. 1988). (explaining that "[s]hould the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it should conduct a hearing in accordance with [Section 309]").

79/ *Notice* at ¶ 109.

80/ The operator should be permitted to classify these filings as confidential to the extent necessary, as discussed in Part VII(C), *infra.*

confidential information of common carriers when record inspection requests are filed with the Commission.[81/]

B. Burden Of Proof

The burden of proof in Section 309 proceedings is generally on the complainant to demonstrate that rates are unreasonable. The burden then shifts to the defendant upon establishing a *prima facie* case.[82/] Thus, if the complainant in a carrier rate increase dispute does not demonstrate that the defendant's rates are unlawfully high, a *prima facie* case is not established,[83/] and the burden of proceeding does not shift to the defendant. The same approach should be adopted here. The complainant has the burden to establish that rates for cable service programming are unreasonable. This could be demonstrated by a showing that programming service rates exceed the relevant benchmark. The burden then shifts to the operator to provide information to justify the rates to demonstrate that the rates are not unreasonable.

C. The Commission Should Protect Cable Operators' Cost Information.

The Commission seeks comment on the treatment of information which may be necessary to resolve a dispute regarding rates, but which the cable operator regards as proprietary. The Commission asserts that "the burden should

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81/ *See* 47 C.F.R. §§ 0.457 - .459 (1992).

82/ *Connecticut Office of Consumer Counsel,* 4 FCC Rcd at 8133.

83/ *MCI Telecommunications v. Southern Bell,* 4 FCC Rcd 8135, 8136 (1989).

be firmly on the cable operator involved to demonstrate that significant competitive injury might result from any disclosure . . . ." *Notice* at ¶ 106. This position is inconsistent with prior decisions of the Commission and the federal courts. The burden should be placed on the complaining party.[84/]

Section 0.457(d) of the Commission's rules states that the Commission has the authority to withhold confidential trade secrets and commercial and financial information from disclosure to the public. 47 C.F.R. § 0.457(d); *see also* 5 U.S.C. § 552(b)(4) (Freedom of Information Act). This section of the Commission's rules should be amended to include information submitted by a cable operator in response to any complaint filed with the Commission regarding rates for basic or cable programming services.[85/] This amendment would be consistent with judicial decisions holding that disclosure of financial information is not appropriate when it would cause substantial competitive harm to the party that submitted the information. *See Nat'l Parks and Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974) (*Nat'l Parks I*).

An operator whose rates are above benchmark levels will seek to justify the rate by submitting information to the Commission that may include

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84/ To the extent that a franchising authority has a contractual right to access information that an operator might otherwise regard as proprietary, such information could be obtained pursuant to the provisions of the franchise agreement.

85/ The Commission is already authorized to apply this non-disclosure rule to other financial reports that might be filed by cable systems. *See* 47 C.F.R. §§ 0.457 (d)(1)(iii), (iv).

detailed and proprietary cost information.[86/] The Commission should amend Section 0.457(d) to prevent disclosure of this type of information.

The Commission has previously acknowledged that cost data "have been recognized by the courts as a category of information with considerable competitive implications. . . . It is 'virtually axiomatic' that disclosure of detailed financial data showing costs and revenues" would cause substantial competitive harm. *Policies and Rules Concerning Operator Service Providers,* 6 FCC Rcd 5058, 5060 (1991), *citing Nat'l Parks and Conservation Ass'n v. Kleppe,* 547 F.2d 673, 684 (D.C. Cir. 1976) (*Nat'l Parks II*).[87/]

In addition to the competitive harm that may result to system operators if cost data is disclosed, third parties may be affected by disclosure.[88/] This is a particularly important issue as it affects third parties such as equipment suppliers and programmers because disclosure of an operator's costs may be the equivalent of revealing the price that was paid to a particular supplier. Since the supplier is not a party to the dispute, the Commission is obliged to consider the supplier's interests in formulating the rules that will govern disclosure.

Even if the Commission decides to withhold disclosure, a party who believes that it is entitled to disclosure may file a request for disclosure pursuant

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86/ This information would also be provided if the Commission determined not to use benchmarks and to rely upon cost support data.

87/ Even when a party seeking non-disclosure is generally protected from competition, it is still possible that disclosure could cause substantial competitive harm. *See Nat'l Parks I*, 498 F.2d at 770.

88/ *Notice* at § 106.

to Section 0.461 of the Commission's rules. 47 C.F.R. § 0.461. As a matter of policy, however, their is little reason, if any, for this information to be disclosed. Resolving complaints over unreasonable rates does not invite an adversarial proceeding in which due process demands disclosure. Complainants have not been given standing by the 1992 Cable Act to prosecute complaints, but only to bring their concerns to the attention of the FCC. From that point on, it is the FCC's sole responsibility to dispose of the complaint.

D. The Commission Should Adopt Reasonable Refund and Rate Reduction Procedures.

The Commission is empowered to require an operator to set a rate which comports with the relevant benchmark, and if necessary, order refunds to affected subscribers.[89/] In keeping with the 1992 Cable Act's mandate to fashion expeditious procedures, the 1992 Cable Act does permit rate reductions for program service rates, and the Commission should design a reduction/refund provision which is the least burdensome to implement.

Initially, the Commission should implement procedures which would enable, but not require the operator to receive a determination that a proposed above the benchmark rate increase is unreasonable prior to the effective date of such increase. If the rate increase is implemented and thereafter becomes the

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89/ *Notice* at ¶ 106. Since the Commission is authorized to "reduce rates for cable programming services," it implicitly has the power to prescribe rates that are reasonable. 47 U.S.C. § 543(c)(1)(C).

subject of a complaint and adverse ruling, the Commission is authorized by the 1992 Cable Act to require a rate reduction or refund of the overcharges.[90/]

The Commission proposes that operators whose rates are found to be unreasonable make rate reductions promptly, and suggests that 30 days would be an appropriate time period to make the reductions. This would be impractical for any cable operator who utilizes cycle billing. Cox believes that it would be reasonable to expect that the refund process would begin within two billing cycles from the date the rate reduction is ordered.[91/] Rate reductions should only be required after an appeal of a decision that a rate is unreasonable is final and is not subject to further review.

In situations where the Commission determines that refunds are necessary, the Commission proposes two alternatives that could be utilized to refund the overcharges. In the first alternative, refunds would be issued to those subscribers who actually paid the overcharges. In the second, refunds would be made to subscribers as a class without regard to the specific individuals who paid the overages. Cox believes that it would be infeasible, burdensome and sometimes impossible to determine and locate the actual subscribers who paid an overcharge, and concurs in the Commission's proposal that there should be a prospective percentage reduction in any unreasonable service rate to cover the cumulative overcharge, and to have the reduction made in the bills sent to the

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90/ 47 U.S.C. § 534(c)(1)(C).

91/ This amount of time is necessary to ensure that operators have sufficient time to adjust their billing records and automated billing systems.

class of subscribers that had been unjustly charged. Once again, Cox believes that two billing cycles is a reasonable time to begin refunds.

E. Rates Are Not Required To Be Uniform On A System-Wide Basis.

Section 623(d) provides that a cable operator shall have a rate structure for the provision of cable service that is uniform throughout the geographic area in which cable service is provided over its cable system. The Commission seeks comment on the meaning of the term "geographic area" under Section 623(d), and whether it refers to uniform rates throughout the geographic area that is served by the system or throughout a franchise area. *Notice* at ¶ 114.

A definition of geographic area as the contiguous area served by a cable system, rather than the franchise area which is served, is inconsistent with the statute's legislative history as expressed in the Senate Report. The Senate Report provides that "cable operators must offer uniform rates throughout the geographic area in which they provide services. This provision is intended to prevent cable operators from implementing different rate structures in different parts of **one cable franchise**. This provision is also intended to prevent cable operators from dropping the rates in one portion of a **franchise** area to undercut a competitor temporarily."[92/]

92/ S. Rep. 92, 102d Cong., 1st Sess. 76 (1992) ("Senate Report") (emphasis added). *See also* 138 Cong. Rec. S14,248 (daily ed. Sept. 21, 1992) (Statement of Sen. Gorton) ("These provisions encourage competition . . . by forbidding a cable system from offering differing prices within a franchise area . . . .")

Despite some concerns expressed in the *Notice*, there are other reasons why the Commission should adopt the view that the term geographic area means franchise area. If geographic area is defined as the entire contiguous area served by the cable system, rather than franchise area, the necessity to offer uniform rates would require that the operator cross-subsidize the rates of certain subscribers. Operators who serve multiple service areas will often encounter varying service requirements. For instance, the requirement to provide sophisticated origination facilities or more elaborate access facilities in a one franchise area will, in turn, require an operator to charge higher subscriber fees in another area; otherwise, one franchise area would end up subsidizing another. As the Commission notes, "different franchises within a system could have differing costs . . . . [C]osts may vary due to differing franchise fees, density of homes passed, the age of the facilities, or many other factors."[93/] Under these circumstances, the only viable method of maintaining a uniform rate structure would be to cross-subsidize rates within the entire geographic area that is served by a single system,[94/] and this would discriminate against certain subscribers.

The fact that Congress did not require all franchising authorities served by the same operator to file a joint certification with the Commission is

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93/ *Notice* at ¶ 115.

94/ The Commission seeks comment on whether Congress intended to require or permit cross-subsidization. *Notice* at ¶ 115. Given the text of the Senate Report, however, this is unlikely. *See* Senate Report at 76.

consistent with this interpretation.[95/] Joint certifications would have been required if Congress had intended that rates be uniform throughout a franchise area. Instead, the option retained by each franchising authority to regulate basic service rates inexorably leads to the conclusion that Congress recognized that, depending on the result of negotiations for the initial grant or renewal of a franchise, rates could differ from community to community.

Moreover, practical concerns dictate that the Commission should interpret the term geographic area as being synonymous with franchise area. An interpretation that Section 623(d) requires uniform rates throughout a system's entire service area would enable a franchising authority to demand that an operator accede to its requirements with the knowledge that higher costs to serve a community could be spread over a system's entire subscriber base.

F. Section 623(e) Is Intended To Address Discrimination.

The Commission is concerned that "if the meaning of geographic area is limited to a franchise area, Section 623(d) . . . would be duplicative of Section 623(e); different rate structures within a franchise area could be prevented by anti-discrimination rules."[96/] These provisions are not duplicative.

95/ *Notice* at ¶ 21. The House Report states that the certification provision is not intended to require franchising authorities to exercise joint regulatory authority, nor should it be interpreted to prohibit joint authority. *See* House Report at 80.

96/ *Notice* at ¶ 114.

Section 623(d) is intended to maintain uniform rates within a franchise area. Section 623(e) allows federal, state and franchising authorities to prohibit discrimination among subscribers to cable service within the area. While Section 623(d) addresses uniformity of rates for cable service, Section 623(e) addresses discrimination in the **provision of cable services**. Though rates would be uniform within a franchise area, operators could not discriminate in delivery of services. Thus, authorities may prohibit cable operators from denying services or the terms of service to some subscribers within a franchise area, while offering those services or terms to others. For example, a system that maintained a converter deposit policy could not alter the policy to require higher deposits in some areas of a franchise than others.

Congress, having established a uniform rate throughout a franchise area, still intended that federal and state authorities retain the ability to pass laws which would protect against discrimination. At the same time, Congress made it clear that offering reasonable discounts to senior citizens and economically disadvantaged groups would not be a discriminatory activity.

The Commission seeks comment on how the uniform rate provision of the 1992 Cable Act[97/] should be implemented with regard to multi-dwelling units ("MDUs"), medical and educational institutions, and other large residential communities or buildings.[98/] Cox submits that cable operators should be afforded

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97/ 47 U.S.C. § 543(d).

98/ *Notice* at ¶ 112.

flexibility to establish bona fide service categories with separate rates to reflect different costs involved in providing service to these types of commercial accounts. Section 623(d) would not be applicable to these types of subscriber accounts.

As noted, the legislative history of S.12, from which the uniform pricing provision was adopted, discusses the purposes behind including the uniform rate provision in the bill: "This provision is . . . intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."[99/] The Senate debate on the Conference Report expressed the same concern: "[The uniform pricing provision] encourage[s] competition by . . . forbidding a cable system from offering differing prices within a franchise area in order to drive out competition where it exists only to later raise their rates when their competitor is driven out."[100/]

Section 623(d) was therefore not meant to proscribe service agreements between operators and MDUs and non-residential accounts which are provided pursuant to arms-length agreements. Cable operators should therefore

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99/ Senate Report at 76.

100/ 138 Cong. Rec. S14,248 (daily ed. Sep. 21, 1992).

be permitted to negotiate individual rate packages with MDU owners and commercial accounts.[101/]

G. Operators Have The Discretion To Determine The Components Of The Basic Service Tier.

The Commission seeks comment on whether "cable operators may add any and as many video programming services to the basic tier as they wish, provided that such services are subject to basic rate regulation."[102/] An operator should be permitted to offer as many (or as few) channels in a basic tier, including video and non-video services, as long as the minimum requirements of Section 623(b)(7)(A) are met.[103/] At a minimum the basic service tier must consist of all must-carry channels, all PEG programming channels, and aside from satellite-delivered signals, all other broadcast signals. But operators are also permitted to add additional video programming signals or services to the basic tier," provided that service rates conform to the basic tier rate regulations.[104/]

101/ Cable operators should not be subject to rate regulation of MDUs and other commercial accounts, or if subject to rate regulation, benchmarks distinct from residential rates should be established. These accounts are subject to arm's length negotiations and cable operators are more likely to face competition from SMATV and MMDS systems in these types of buildings. Operators must have the flexibility to provide service pursuant to individually negotiated agreements in order to be able to compete with SMATV and MMDS systems which have no constraints on their ability to negotiate with owners and managers of MDUs and commercial accounts.

102/ *Notice* at ¶ 11.

103/ 47 U.S.C. § 543(b)(7)(A).

104/ 47 U.S.C. § 543(b)(7)(B).

Any franchise provision that requires operators to provide a fixed number of channels of basic cable service is incompatible with Section 623(b)(7)(A) to the extent that an operator is prevented from offering a basic service that comports with the minimum requirements of the 1992 Cable Act. Congress sought to "ensure that the rates for the basic tier of service are reasonable," leaving it to the operator to determine the specific mix of services that would be included in the basic service tier. To carry out Congress's objective, franchise provisions which are inconsistent with this policy should be deemed to be preempted, and cable operators should be permitted to retier services to provide access to a low cost basic tier without being restricted by any franchise provisions that may require the inclusion of more expensive services on the basic tier. This principle should be applicable to all cable television franchises under which operators provide service, and Section 623(b)(1) should be deemed to preempt any franchises that prohibit such a basic rate structure.

H. Section 623(b)(8)(A) Applies Only To Per Channel And Per Program Services.

The Commission seeks comment on whether Section 623(b)(7)(A), which defines basic service as a tier "to which subscription is required for access to any other tier of service,"[105/] precludes a cable operator from offering *a la carte* video services without subscribing to the basic service tier.[106/]

105/ 47 U.S.C. § 543(b)(7)(A).

106/ *Notice* at ¶ 12.

The Commission also seeks comment on its interpretation of Section 623(b)(8)(A), which prohibits an operator from requiring subscription to any tier other than the basic tier as a condition to access other video services. The Commission interprets this section as precluding an operator from requiring the purchase of services in addition to the basic tier as a precondition for ordering other programming. The Commission also questions whether other interpretations might preclude subscribers from purchasing a nonvideo or "institutional network" without first purchasing the basic tier.

The Commission has gone too far in its interpretation of the law. Operators should be permitted to offer a package of cable programming services conditioned on the subscriber purchasing a second level of other cable programming services. Where for example, an operator offers two levels of cable programming services, A and B, it would be permissible to require a subscriber to take package A as a condition to subscribing to package B. The 1992 Cable Act only precludes cable operators, as a condition of access to video programming offered on **a per channel** or **per program basis**, from requiring the subscription to any tier other than the basic service tier. This interpretation is supported both by the House Report and the Senate debate on the Conference Report.[107/] There is

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107/ "Subsection (b)(3) [of Section 623(5)(3) of the House bill] prohibits cable operators from requiring subscribers to purchase any tier of service other than the regulated basic tier before being permitted to purchase programming offered on a per-channel or per-program basis." House Report at 85. Sen. Inouye commented, "The purpose of [the anti buy-through] provision is to increase the options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programs." Cong. Rec. S14,608-09 (daily ed. Sept. 22, 1992).

no indication from either the statute or its legislative history that Congress intended to otherwise prescribe an operator's ability to package programming services as it deemed appropriate and commercially attractive to subscribers.

I. A La Carte Video Services May Be Sold Separately From The Basic Tier.

Cable operators may, in the future, decide to offer services solely on a pay-per-program basis and this should not be prohibited. The 1992 Cable Act does not preclude cable operators from offering individual video services independent of the basic service tier. Basic service subscription is a prerequisite only to other **tiers** of service, and should not be construed to require subscribers to purchase basic service when they prefer to receive only *a la carte* video program services and the operator is willing to sell services on that basis. As the Commission suggests in paragraph 12 of the *Notice*, the basic buy-through restriction was explicitly placed on other **tiers** of service, leading to the conclusion that Congress may have "intended to permit consumers the option of purchasing services, such as premium channels, or the services of a leased access programmer, on a stand-alone basis."[108/] This interpretation is consistent with the Commission's policy to develop other competitive video programming services. For example, providers of a video dialtone service would be able to offer consumers *a la carte* video selections, as would providers of DBS and wireless services. Cable operators would be placed at a competitive disadvantage if in the

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108/ *Notice* at ¶ 12.

future they were not able to offer *a la carte* programming in competition with alternate video program providers.

J. Bundled A La Carte Services Should Not Be Subject To Rate Regulation.

Pay per view and per channel services that are packaged as a unit should not be subject to rate regulation pursuant to Section 623(c). As long as an operator offers a service on an *a la carte* basis, the bundling of that service with other *a la carte* services at a discounted rate should not subject the bundled package to rate regulation. Offering subscribers to per channel services an opportunity to reduce their per channel costs when purchasing additional per channel services could hardly be said to work to the disadvantage of subscribers. To the contrary, subscribers should have the benefit of choosing between multiple channel promotions at discounted prices or selecting individual premium channels on an *a la carte* basis.

K. Non-Video Services May Be Sold Separately From The Basic Tier.

The Commission questions whether Section 623(b)(8)(A) might be interpreted to preclude subscribers from purchasing nonvideo or institutional network services on an *a la carte* basis.[109/] The 1992 Cable Act, however, only

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109/ *Notice* at ¶ 12.